Supreme Court, U.S.
FILED
95-1040 DEC 19 1995
OFFICE OF THE CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

STATE OF ALABAMA,

PETITIONER

VS.

MARK ANTHONY SEELEY,

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

PETITION OF THE STATE OF ALABAMA, PETITIONER

OF

JEFF SESSIONS, ATTORNEY GENERAL

AND

JOSEPH G. L. MARSTON, III*
ASSISTANT ATTORNEY GENERAL

ATTORNEYS FOR RESPONDENT

ADDRESS OF COUNSEL:

Office of the Attorney General
Alabama State House
11 South Union Street
Montgomery, Alabama 36130
(334) 242-7300

*COUNSEL OF RECORD

48 pp

QUESTIONS PRESENTED

1. Does an officer, who has lawfully seized an opened package from a private shipper on the basis of probable cause to believe that the package contains contraband, violate the Fourth Amendment when he obtains a sample from the package and subjects it to a field test, without first obtaining a warrant?

2. In light of California v. Acevedo, (500 U.S. ___, 114 L. Ed 2d 619, 631ff, 111 S. Ct. 1982 [1991]), should this Honorable Court address the continuing confusion over the rule of which requires a warrant for the inspection of lawfully seized containers.

THE PARTIES

In the Circuit Court of Morgan County, Alabama, the Court of Criminal Appeals of Alabama, and the Supreme Court of Alabama, the parties were Mark Anthony Seeley, who is Respondent herein, as Defendant, Appellant, and Respondent, respectively, and the State of Alabama, who is Petitioner herein, as Plaintiff, Appellee, and Petitioner respectively.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED.....	ante, I
THE PARTIES.....	ante, III
TABLE OF CASES.....	iii
TABLE OF CONSTITUTIONAL PROVISIONS.....	vi
TABLE OF STATUTES.....	vi
OPINIONS AND ORDERS BELOW.....	2
JURISDICTION.....	3
CONSTITUTIONAL PROVISIONS INVOLVED.....	3
STATUTORY PROVISIONS INVOLVED.....	5
STATEMENT OF THE CASE.....	6
STATEMENT OF THE FACTS.....	9
SUMMARY OF THE ARGUMENT.....	19
ARGUMENT.....	21

REASON FOR GRANTING THE WRIT:

CONFLICT WITH THE CONTROLLING DECISIONS OF THIS HONORABLE COURT, ESPECIALLY UNITED STATES V. JACOBSEN, 466 U.S. 109, 80 L.ED.2D. 85, 104 S.CT. 1652 (1984)..... 21

CONCLUSION..... 38

TABLE OF CASES

	PAGE(S)
Arkansas v. Sanders 442 U.S. 753, 61 L. Ed 2d 235, 99 S. Ct. 2586 (1979).....	21-37
Castleberry v. State 678 P. 2d 720 (Okl. Cr. App, 1984).....	31
California v. Acevedo 500 U.S. ___, 114 L. Ed 2d 619, 111 S. Ct. 1982 (1991).....	23,32
Ex parte Hilley 484 So. 2d 485 (Ala, 1985).....	36
Ex parte State ___ So. 2d ___ (Ala, 1995).....	3
Gustafson v. Florida 414 U.S. 260, 38 L. Ed 2d 456, 94 S. Ct. 488 (1973).....	37
Illinois v. Lafayette 462 U.S. 640, 77 L. Ed 2d 65, 103 S. Ct. 2605 (1983).....	25,37

MacLaird v. State
718 P. 2d 41 (Wyo, 1986)..... 36

Marquez v. State
754 P. 2d 705 (Wyo, 1988)..... 36

Murry v. United States
487 U.S. 533, 101 L. Ed. 2d 472, 108 S. Ct. 2529 (1988)..... 35

New York v. Belton
453 U.S. 454, 69 L. Ed 2d 768, 101 S. Ct. 2860 (1981)..... 29,30

Oklahoma v. Castleberry
471 U.S. 146, 85 L. Ed 2d 112, 105 S. Ct. 1859 (1985)..... 31

Robbins v. California
453 U.S. 420, 69 L. Ed 2d 744, 101 S. Ct. 2841 (1981)..... 29-31

Seeley v. State
___ So. 2d ___ (Ala. Cr. App, 1995)..... 3,7-19

Segura v. United States
468 U.S. 796, 82 L. Ed. 2d 599, 104 S. Ct. 3380 (1984)..... 35

Snyder v. State
629 S. W. 2d 930, 29 A.L.R. 4th 755, (Texas Cr.App, 1982)..... 25

United States v. Chadwick
433 U.S. 1, 53 L. Ed 2d 538, 97 S. Ct. 2476 (1977)..... 21-38

United States v. Jacobsen
466 U.S. 109, 80 L. Ed 2d 85, 104 S. Ct. 1652 (1984)..... passim

United States v. Jacobsen
683 F. 2d 296 (8th Cir, 1982)..... 32

United States v. Joseph
829 F. 2d 724 (9th Cir, 1987)..... 25

United States v. Robinson
414 U.S. 218, 38 L. Ed 2d 427, 94 S. Ct. 467 (1973)..... 37

United States v. Ross
456 U.S. 798, 72 L. Ed
2d 572, 102 S. Ct. 2157
(1982)..... 30, 31

Walter v. United States
447 U.S. 649, 65 L. Ed
2d 410, 100 S. Ct. 2395
(1980)..... 21-38

TABLE OF CONSTITUTIONAL PROVISIONS

PAGE(S)

United States Constitution, 1787

Amendment Four, 1791..... 3-4

Amendment Fourteen, 1868. 3-5

TABLE OF STATUTES

Code of Alabama, 1975

Title 13A, Section 13A-5-6. 5

Section 13A-12-212 5

United States Code,

Title 28, Section 1257... 3

NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1995

STATE OF ALABAMA

PETITIONER,

V.

MARK ANTHONY SEELEY,

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

PETITION OF THE STATE OF ALABAMA,
PETITIONER

The State of Alabama, Your Petitioner respectfully prays that a writ of certiorari issue to review the opinion and orders of the Supreme Court of Alabama in the above cause.

OPINIONS AND ORDERS BELOW

The order of the Circuit Court of Marshall County, Alabama, refusing to suppress the evidence found and seized in this case is was not written.

The opinion of the Court of Criminal Appeals of Alabama, reversing the Circuit Court's order and remanding the cause is not yet reported, but will be reported as follows:

Seeley v. State

___ So. 2d ___ (Ala. Cr. App, 1995)

A copy of the same is submitted as Appendix "A" to this petition.

The order of the Supreme Court of Alabama denying certiorari and the dissenting opinion are not yet reported but will be reported as follows:

Ex parte State of Alabama

___ So. 2d ___ (Ala, 1995)

A copy of the same is submitted as Appendix "B" to this petition.

JURISDICTION

The order of the Supreme Court of Alabama denying certiorari was issued on September 22, 1995, and this petition is filed within ninety (90) days of said date. This Honorable Court's Jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Alabama Supreme Court believed that its decision was mandated by the Fourth Amendment and Section 1 of the Fourteenth Amendment to the Constitution of the United States. Your Petitioner is

making a claim under the same said provisions. Said constitutional provisions read as follows:

AMENDMENT IV

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

"AMENDMENT XIV

"Section 1.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any

state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS INVOLVED

The issues in this case do not involve any statutory provisions.

Respondent Seeley was convicted of possession of cocaine under Section 13A-12-212, Code of Alabama, 1975. He was sentenced under Section 13A-5-6 of the same Code. Copies of these statutes are set out in Appendix "C" to this petition.

STATEMENT OF THE CASE

The Respondent, Mark Anthony Seeley, who will hereinafter be referred to as "Seeley", was indicted for trafficking in cocaine and excise tax evasion by the Grand Jury of Marshall County, Alabama, at its May, 1993, Term. (R. pp. 1A-2A)

On December 13, 1993, Seeley was arraigned on the indictment and pleaded not guilty. (R. pp. 1 and 16)

If Seeley filed a motion to suppress, it is not in this record. On April 18, 1994, the State filed a response to such a motion. Evidence on the same was heard on April 18, 1994, before Honorable William C. Gullahorn, a Circuit Judge. On hearing the evidence and argument of counsel,

Judge Gullahorn overruled the motion to suppress. (R. pp. 35-36 and Tr. pp. 1-81)

On May 2-4, 1994, the cause came on for trial. After a jury was struck, the Seeley withdrew his not guilty plea, and entered a plea of guilty to possession of cocaine.(R. pp. 3-4 and Tr. p. 83)

On June 22, 1994, Seeley was sentenced to seven years imprisonment, all but sixty days on probation. (R. pp. 5-7 and Tr. pp. 82-102)

Appeal followed. (Tr. p. 100)

On March 24, 1995, the Honorable Court of Criminal Appeals of Alabama reversed Seeley's conviction. The Court of Criminal Appeals correctly held:

> This case is controlled entirely by the United States Supreme Court's interpretation of search and seizure law as set

> out in United States v. Jacobsen, 466 U.S. 109, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984). The facts in this case are remarkably similar to those in Jacobsen...." (Appendix "A", page 1-2)

The Court then immediately strayed into error writing:

> "...but the application of the principles of that case mandate a different outcome in this case...." (Ibid.)

On April 7, 1995, the State applied for rehearing raising the same claims which are presented by the instant petition. On May 5, 1995, the Court of Criminal Appeals denied rehearing without further opinion.

The State petitioned the Alabama Supreme Court for review by a writ of certiorari raising the issues presented by this petition. Certiorari was denied on

September 22, 1995, Justice Maddox submitted a dissenting opinion. (Appendix "B")

STATEMENT OF THE FACTS

The Court of Criminal Appeals, correctly found the facts as follows:

> "The state's evidence at the appellant's suppression hearing tended to show that on January 30, 1993, the Federal Express Courier service office in Madison, Alabama, received a package addressed to the appellant bearing a return address in Dallas, Texas. Fred Kaufmann, the Federal Express operations manager in Madison,

testified that they were unable to deliver the package because the courier had trouble finding the address and because the customer service agent was unable to contact the appellant by telephone. Apparently the telephone number that had been given as the appellant's was no longer in service.

"Kaufmann testified that if Federal Express cannot resolve a delivery problem through research, then it is a company practice to open the package to see if any other delivery information can be found. Kaufmann testified that he

opened the package. He testified that the package was about the size of a shoe box and that it was heavily wrapped in masking tape. Inside the package he found a tubular package wrapped in tape and packed in newspaper. Kaufmann testified that he smelled a strong odor similar to insecticide coming from the package. At that point he became suspicious and decided to call Officer Billy Ware, a narcotics officer with the Huntsville Police Department. He testified that he left the

package in the same condition it was in until Ware arrived.

"Ware testified that he arrived at the Federal Express office to inspect the package. Like Kaufmann, he testified that many substances are used to mask the smell of narcotics in packages-- e.g., herbicide, gasoline, diesel fuel, fabric softener and coffee. He then squeezed the tubular package and felt a powdery, granulated substance inside. Ware testified that he told Kaufmann that in his opinion the package contained narcotics. At that point, Ware called Officer

Michael Posey of the Huntsville Police Department K-9 unit and asked him to bring his narcotics detection dog to the office. Before Posey arrived, Ware placed the tubular package in a metal electrical box on the wall in the southeast section of the warehouse portion of the office.

"Posey testified that when he arrived, Ware instructed him to have the dog search the southeast section of the warehouse. Posey testified that the dog 'alerted' in the area of the electrical box where the package was located. Posey testified that an 'alert' occurs

when the dog smells narcotics. He said that the dog's breathing pattern changes but that at that point the dog has not yet pinpointed the location. When the dog finds the strongest source of the oder it will scratch or bite at that location. Posey testified that his dog scratched on the electrical box where the package was located. At that time, Posey pulled the dog off the search area and told Ware that there was a strong indication of narcotics in the electrical box where the package was hidden.

Ware then retrieved the package from the electrical box.

"Ware testified that he told Kaufmann that he was going to take the package to his office and he then signed a receipt for it. When Ware arrived at his office, he called the district attorney and explained how he came into possession of the package. After he talked with the district attorney, Ware opened the package and performed a field test on the white powder contained inside. Ware testified that the test gave a positive indication for the

presence of cocaine. Subsequent testing by the Alabama Department of Forensic Sciences proved that the powder was cocaine. He said that he then secured the package in his drug evidence locker.

"On Monday, February 1, 1993, someone from Federal Express telephoned to tell Ware that the appellant had telephoned Federal Express and that he wanted his package delivered. Ware began making arrangements with the Marshall County Sheriff's Department for a controlled delivery. Ware testified that in preparation

for the controlled delivery, he removed most of the cocaine powder the package. He then mixed about 1.4 ounces of baking soda with two or three grams of the cocaine powder and put that mixture in the package. Also, Ware borrowed a van and a courier's uniform from Federal Express in order to make the delivery.

"Ware telephoned the appellant on Monday and arranged to deliver the package on Tuesday, February 2, 1993, at a place in Marshall County near Guntersville. Ware met with three officers from the Marshall

County Sheriff Department's drug enforcement unit to execute the controlled delivery. These officers were Sonny Riddle, Paul Evans, and Martin Killion. Martin Killion wore the Federal Express uniform and drove the van to make the delivery while Ware, Riddle, and Evans waited nearby. Killion met the appellant at the designated location and delivered the package and the appellant signed for it, got in his car, and drove away. After the appellant had driven a few blocks, Ware, Riddle, and Evans stopped his car and arrested him. The

package was recovered from the appellant...." (Appendix "A", pages 2-9)

SUMMARY OF THE ARGUMENT

The conflict between the decision of the State courts in this case and the decisions of this Honorable Court is obvious.

This Court has overruled the rule of United States v. Chadwick, (433 U.S. 1, 53 L.Ed.2d 538, 97 S.Ct. 2476 [1977]), and Arkansas v. Sanders, (442 U.S. 753, 61 L.Ed.2d 235, 99 S.Ct. 2586 [1979]), because of the confusion generated by that rule and the minimal protection the rule gave to citizens. The rule of United States v. Chadwick and Walter v. United

States, (447 U.S. 649, 65 L.Ed.2d 401, 100 S.Ct. 2395 [1980]), generates at least as much confusion and provides no more protection to citizens.

The Chadwick - Walter rules is inconsistent with the relevant general law.

For these reasons, the rule should at least be limited to luggage and expressive materials.

ARGUMENT

REASON FOR GRANTING THE WRIT: CONFLICT WITH THE CONTROLLING DECISIONS OF THIS HONORABLE COURT, ESPECIALLY UNITED STATES V. JACOBSEN, 466 U.S. 109, 80 L.ED.2D 85, 104 S.Ct. 1652 (1984).

That the decision of the Court of Criminal Appeals of Alabama is in conflict with United States v. Jacobsen, (466 U.S. 109, 80 L.Ed.2d 85, 104 S.Ct. 1652 [1989]), is obvious. In the opening lines of its opinion, the Court of Criminal Appeals recognized that Jacobsen was controlling. In the next sentence, the Court described the facts in this case as, "...remarkably similar to those in Jacobsen...." (Appendix "A", pages 1-2) The relevant facts are actually

identical. The only difference between the facts in Jacobsen and those in this case is that, in Jacobsen the officers could see the white powder, while in this case they could only feel powder, but, in this case, the officers had the additional evidence provided by the drug dog. However, those facts relate to probable cause, and it is undisputed that, as in Jacobsen, the officers in this case had probable cause which authorized the seizure of the package.

The issue in Jacobsen, as in this case, was whether the officers, having lawfully seized the package pursuant to probable cause, could open the package and test its contents without first obtaining a search warrant. The Court of Criminal

Appeals misread the facts in Jacobsen to be that the private parties, rather than the government agents, opened the plastic bags of drugs. (Appendix "A", page 18) This was the key to that Court's decision, and was, quite simply, wrong. Jacobsen 466 U.S. 109, 111-112, 80 L. Ed 2d 85, 93. Was a warrant required? In Jacobsen, this Honorable Court said, "No"; in this case the Court of Criminal Appeals of Alabama said, "Yes." The conflict is obvious.

In California v. Acevedo, (500 U.S. ___, 114 L.Ed.2d 619, 111 S.Ct. 1982 [1991]), this Court overruled the rule of United States v. Chadwick, (433 U.S. 1, 53 L.Ed.2d 538, 97 S.Ct. 2476 [1977]) and Arkansas v. Sanders, (442 U.S. 753, 61 L.Ed.2d 235, 99 S.Ct. 2586 [1979]). The

Court pointed out that the Chadwick - Sanders rule had created an enormous amount of confusion for courts and law enforcement officers and provided little additional protection for citizens. California v. Acevedo, above, 114 L.Ed.2d 619, 632-634. The instant case involves the rule of United States v. Chadwick and Walter v. United States, (447 U.S. 649, 65 L.Ed.2d 410, 100 S.Ct. 2395 [1980]). The instant case demonstrates that the Chadwick - Walter rule generates at least as much confusion.

In the usual search and seizure situation, officers, first, search, then find and, finally seize weapons, evidence or contraband. If the search is lawful and there is probable cause to believe

that the items are subject to seizure, then the seizure is lawful. However, having lawfully seized an item, may the officer search the item itself? For example, if an officer lawfully searches an arrestee and lawfully seizes her purse or his wallet, may the officer examine the contents thereof? See Illinois v. Lafayette 462 U.S. 640, 77 L. Ed 2d 65, 103 S. Ct. 2605 (1983) and Snyder v. State 629 S.W. 2d 930, 29 A.L.R. 4th 755 (Tex.Cr.App, 1982). Or, suppose the State lawfully seizes records, may the records be lawfully examined by a federal agency? See United States v. Joseph 829 F. 2d 724 (9th Cir, 1987). Since a seizure is a greater infringement on the rights of the owner than a search, the logical

principle, "he who may do the greater may do the lesser", seems to dictate an affirmative answer. However, in United States v. Chadwick, above, this Honorable Court reached the opposite conclusion in the case of lawfully seized luggage.

In Chadwick, a locked footlocker was seized from a vehicle incident to a lawful arrest, taken to the federal building and searched without a warrant. The Court ruled that, although the government agents were authorized to seize the locker, transport it to the federal building, and retain custody of it and although there was clear probable cause to believe that the locker contained contraband, the agents were not authorized to search it without a warrant. Chadwick established

the principle that the fact that an item is lawfully seized and held as evidence, does not necessarily mean that it may be searched without a warrant. Chadwick established the principle that he who may do the greater may not necessarily do the lesser, and that sometimes one may seize but not search. It is the application of this "touch but don't look" concept, which has led to so much confusion and so much litigation.

In Arkansas v. Sanders, above, the Court extended the Chadwick rule to luggage which was actually in a vehicle when searched. The Court refused to extend the vehicle exception to the warrant requirement to luggage lawfully found in a vehicle.

Chadwick and Sanders both involved searches of lawfully seized luggage, and the general understanding at the time was that the rule was limited to luggage. In the year following Sanders, the Court handed down Walter v. United States, above. Walter did not involve luggage, but another item of special judicial concern, expression. In Walter, federal agents lawfully seized pornographic film. Citing concern for expression, (United States v. Walter, above, 447 U.S. 649, 655, 65 L. Ed 2d 410, 417), this Court ruled that the agents should have obtained a warrant before viewing the film. Thus, it appeared that lawfully seized luggage and expressive materials could not be searched without a warrant.

Whatever else might be said about the Chadwick - Sanders - Walter Rule, at least the luggage and expression limitation provided a black line for police officers and courts. Whenever these materials were involved, they knew that a special rule applied.

Then came Robbins v. California, (453 U.S. 420, 69 L. Ed 2d 744, 101 S. Ct. 2841 [1981]), and New York v. Belton, (453 U.S. 454, 69 L. Ed 2d 768, 101 S. Ct. 2860 [1981]), which were decided the same day. Neither Robbins nor Belton involved luggage or expressive materials. Robbins involved plastic wrapped around a quantity of contraband in the trunk of a vehicle; Belton involved a jacket found on the back seat of a vehicle. The Court applied the

Chadwick, "luggage rule" to the wrapping in Robbins, but declined to apply it to the jacket in Belton.

The following year, the Court sought to settle the confusion generated by Robbins and Belton in United States v. Ross, (456 U.S. 798, 72 L.Ed 2d 572, 102 S. Ct. 2157 [1982]). Ross provided a good opportunity for the Court to draw a distinction between luggage and other containers, since the case involved two containers - a brown paper bag, which was clearly not luggage, and a red leather zippered pouch, which could be considered luggage. (456 U.S. 798, 72 L. Ed 2d 572, 579) However, the Court rejected a distinction between "worthy and unworthy containers", (456 U.S. 798, 822, 72 L. Ed

2d 572, 592). In Ross, the Court ruled that, if there is probable cause to search a vehicle, all parts as to which there is probable cause may be searched, as well as any containers in the vehicle as to which probable cause exists. The Court recognized that this holding precluded the results reached in Arkansas v. Sanders, above, and Robbins v. California, above, but did not overrule those cases. (456 U.S. 798, 824, 72 L. Ed 2d 572, 593) This, of course, led to even more confusion. This confusion was further exacerbated three years later when an equally decided court affirmed the decision and opinion of the Oklahoma Court of Criminal Appeals in Castleberry v. State, (678 P. 2d 720 [Okl. Cr.App, 1984]), in Oklahoma v. Castleberry

(471 U.S. 146, 85 L. Ed 2d 112, 105 S. Ct. 1859 [1985]). Hopefully, this confusion is now cleared by California v. Acevedo, above, which as noted, overruled the Chadwick - Sanders Rule.

The instant case was not decided under the Chadwick - Sanders - Robbins and Belton line of cases, but under the Chadwick - Walter - Jacobsen line.

The bases of Walter v. United States, which the Eighth Circuit followed in United States v. Jacobsen (683 F. 2d 296, 299 [8th Cir, 1982]), and which the Honorable Court of Criminal Appeals of Alabama inadvertently followed in this case, were Chadwick, (United States v. Walter 447 U.S. 649, 654, 65 L. Ed 2d 410, 416-417), and concern for expressive

materials, (Ibid, 447 U.S. 649, 655, 65 L., Ed 2d 410, 417). The materials involved in Jacobsen did not involve expression in any sense, so in applying Walter in Jacobsen, the Eighth Circuit apparently viewed Walter as a general extension of Chadwick. In reversing the Eight Circuit, this Honorable Court limited Walter to its facts. United States v. Jacobsen 466 U.S. 109, 115-118, 80 L. Ed 2d 85, 95-97, 104 S. Ct. 1652 (1984) However, at the root of the problem in Jacobsen is the Chadwick "seize but don't search" or "touch but don't look" rule.

One problem with Chadwick, is that it requires officers to act in a manner which is inconsistent with human nature. If an

officer has probable cause to believe that certain contraband is concealed in a container, his or her natural response would be, not to seize the container, but to open it and see if the contraband is, in fact, present. And if it is, then seize the container.

Another problem, is: Just how much protection does Chadwick actually give citizens? In the situation we describe above, if the officer were to comply with Chadwick and seize the container and go for a warrant, the innocent owner would be deprived of his property for the length of time it takes to get a warrant. If an immediate search discloses no contraband, the property can be immediately restored to the owner. Finally, if the officer

violates Chadwick, and opens the container, and finds contraband, he or she can still obtain a valid search warrant for the container on the basis of the information he or she had prior to opening the container. Sequra v. United States, 468 U.S. 796, 82 L.Ed.2d 599, 104 S.Ct. 3380 (1984); Murray v. United States, 487 U.S. 533, 101 L.Ed.2d 472, 108 S.Ct. 2529 (1988) Thus, Chadwick - Walters provides little protection to a citizen whose property is already lawfully seized. Compare California v. Acevedo, above 114 L.Ed.2d 619, 631-632.

In the instant case, it is most difficult to see how Respondent Seeley would have been better off, if Officer Ware, before testing the material, had

obtained a search warrant and served it on himself or the custodian of the police evidence safe.

Finally, we submit that Chadwick - Walters is inconsistent with the relevant general law. Under Chadwick, certain containers may not be searched, without a warrant, even though they are lawfully seized and are lawfully in police custody. However, the general rule is that property which is lawfully in police custody may be searched without a warrant. E. g. Ex parte Hilley 484 So. 2d 485 (Ala, 1985); Marquez v. State 754 P. 2d 705 (Wyo, 1988); MacLaird v. State 718 P. 2d 41 (Wyo, 1986) Perhaps most striking of all is that, while Chadwick holds that containers in police custody can not be

search without a warrant, persons in police custody may be search without a warrant. Illinois v. Layfette 462 U.S. 640, 77 L. Ed 2d 65, 103 S. Ct. 2605 (1983); United States v. Robinson 414 U.S. 218, 38 L. Ed 2d 427, 94 S. Ct. 467 (1973). Gustafson v. Florida 414 U.S. 260, 38 L. Ed 2d 456, 94 S. Ct. 488 (1973) This is the sort of inconsistency at the level of practical application which so confuses police officers.

We submit that this Honorable Court should re-examine the Chadwick - Walters rule and at least limit it to its original fields of of application, luggage and expressive materials.

CONCLUSION

In conclusion your Petitioner, the State of Alabama, respectfully submits that in this case the Supreme Court of Alabama erroneously ruled contrary to the decisions of this Honorable Court. In addition, this case provides an opportunity to clarify the Chadwick - Walter rule.

Therefore, Your Petitioner prays that this Honorable Court will issue a writ of certiorari and will review the matters complained of and reverse the decision of

Supreme Court of Alabama.

Respectfully submitted,

JEFF SESSIONS

ATTORNEY GENERAL

BY:

_____

JOSEPH G. L. MARSTON, III

ASSISTANT ATTORNEY GENERAL

ATTORNEYS FOR THE

PETITIONER

7470I

Supreme Court, U.S.
FILED
95-1040 DEC 19 1995
OFFICE OF THE CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

STATE OF ALABAMA,

PETITIONER,

V.

MARK ANTHONY SEELEY,

RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

APPENDIX TO THE PETITION

OF

JEFF SESSIONS
ATTORNEY GENERAL

AND

JOSEPH G. L. MARSTON, III*
ASSISTANT ATTORNEY GENERAL

ATTORNEYS FOR PETITIONER

ADDRESS OF COUNSEL:

Office of the Attorney General
Criminal Appeals Division
Alabama State House
11 South Union Street
Montgomery, Alabama 36130

*Counsel of Record

46 pp

TABLE OF APPENDICIES

APPENDIX A, OPINION OF THE COURT OF CRIMINAL APPEALS OF ALABAMA.....1

APPENDIX B, ORDER DENYING CERTIORARI AND DISSENTING OPINION OF THE SUPREME COURT OF ALABAMA.....23

APPENDIX C, RELEVANT ALABAMA STATUTES.....41

TITLE 13A, SECTION 13A-5-6.....41

SECTION 13A-12-212.....43

APPENDIX A

RELEASED

MARCH 24, 1995

CLERK

ALA COURT CRIMINAL APPEALS

THE STATE OF ALABAMA - JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1994-1995

CR-93-1739

Mark Anthony Seeley

v.

State Appeal from Marshall Circuit Court

(CC-93-173)

TAYLOR, PRESIDING JUDGE

This case is controlled entirely by the United States Supreme Court's interpretation of search and seizure law as set out in United States v. Jacobsen, 466 U. S. 109, 104 S. Ct. 1652, 80 L. Ed. 2d 85 (1984). The facts in this case are

remarkably similar to those in Jacobsen, but the application of the principles of that case mandate a different outcome in this case.

The appellant, Mark Anthony Seeley, pleaded guilty to possession of a controlled substance (cocaine), a violation of §13A-12-212, Code of Alabama 1975. He specifically reserved his right to appeal the trial court's denial of his motion to suppress certain evidence and was sentenced to seven years in the penitentiary. His sentence was split and he was ordered to serve 60 days in jail and to spend 3 years on supervised probation.

The state's evidence at the appellant's suppression hearing tended to show that on January 30, 1993, the Federal Express courier service office in Madison,

Alabama, received a package addressed to the appellant bearing a return address in Dallas, Texas. Fred Kaufmann, the Federal Express operations manager in Madison, testified that they were unable to deliver the package because the courier had trouble finding the address and because the customer service agent was unable to contact the appellant by telephone. Apparently the telephone number that had been given as the appellant's was no longer in service.

Kaufmann testified that if Federal Express cannot resolve a delivery problem through research, then it is a company practice to open the package to see if any other delivery information can be found. Kaufmann testified that he opened the package. He testified that the package was about the size of a shoe box and that it

was heavily wrapped in masking tape. Inside the package he found a tubular package wrapped in tape and packed in newspaper. Kaufmann testified that he smelled a strong odor similar to insecticide coming from the package. At that point he became suspicious and decided to call Officer Billy Ware, a narcotics officer with the Huntsville Police Department. He testified that he left the package in the same condition it was in until Ware arrived.

Ware testified that he arrived at the Federal Express office to inspect the package. Like Kaufmann, he testified that there was a strong odor of "bug spray." Ware testified that many substances are used to mask the smell of narcotics in packages--e.g., herbicide, gasoline, diesel fuel, fabric softener, and coffee.

He then squeezed the tubular package and felt a powdery, granulated substance inside. Ware testified that he told Kaufmann that in his opinion the package contained narcotics. At that point, Ware called Officer Michael Posey of the Huntsville Police Department K-9 unit and asked him to bring his narcotics detection dog to the office. Before Posey arrived, Ware placed the tubular package in a metal electrical box on the wall in the southeast section of the warehouse portion of the office.

Posey testified that when he arrived, Ware instructed him to have the dog search the southeast section of the warehouse. Posey testified that the dog "alerted" in the area of the electrical box where the package was located. Posey testified that an "alert" occurs when the

dog smells narcotics. He said that the dog's breathing pattern changes but that at that point the dog has not yet pinpointed the location. When the dog finds the strongest source of the odor it will scratch or bite at that location. Posey testified that his dog scratched on the electrical box where the package was located. At that time Posey pulled the dog off the search area and told Ware that there was a strong indication of narcotics in the electrical box where the package was hidden. Ware then retrieved the package from the electrical box.

Ware testified that he told Kaufmann that he was going to take the package to his office and he then signed a receipt for it. When Ware arrived at his office, he called the district attorney and explained how he came into possession of

the package. After he talked with the district attorney Ware opened the package and performed a field test on the white powder contained inside. Ware testified that the test gave a positive indication for the presence of cocaine. Subsequent testing by the Alabama Department of Forensic Sciences proved that the powder was cocaine. He said that he then secured the package in his drug evidence locker.

On Monday, February 1, 1993, someone from Federal Express telephoned to tell Ware that the appellant had telephoned Federal Express and that he wanted his package delivered. Ware began making arrangements with the Marshall County Sheriff's Department for a controlled delivery. Ware testified that in preparation for the controlled delivery, he removed most of the cocaine powder from

the package. He then mixed about 1.4 ounces of baking soda with two or three grams of the cocaine powder and put that mixture in the package. Also, Ware borrowed a van and a courier's uniform from Federal Express in order to make the delivery.

Ware telephoned the appellant on Monday and arranged to deliver the package on Tuesday, February 2, 1993, at a place in Marshall County near Guntersville. Ware met with three officers from the Marshall County Sheriff Department's drug enforcement unit to execute the controlled delivery. These officers were Sonny Riddle, Paul Evans, and Martin Killion. Martin Killion wore the Federal Express uniform and drove the van to make the delivery while Ware, Riddle, and Evans waited nearby. Killion met the appellant

at the designated location and delivered the package and the appellant signed for it, got in his car, and drove away. After the appellant had driven a few blocks, Ware, Riddle, and Evans stopped his car and arrested him. The package was recovered from the appellant.

The appellant contends on appeal that the trial court erred in denying his motion to suppress the cocaine. More specifically, he contends that Ware's warrantless search and seizure of the package violated his rights under the Fourth and Fourteenth Amendments to the United States Constitution. The Fourth Amendment to the United State Constitution states:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated,

> and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

"Subject to only a few exceptions, the Fourth and Fourteenth Amendments of the United States Constitution support the proposition that a search conducted without a warrant issued on probable cause is unreasonable." Brannon v. State, 549 So.2d 532 536 (Ala. Cr. App. 1989). These exceptions include: "(1) plain view, (2) consent, (3) incident to a lawful arrest, (4) hot pursuit or emergency situations, (5) exigent circumstances coupled with probable cause, and (6) stop and frisk situations." Brannon, 549 So.2d at 536. This case involves several events that could possibly invoke the application

of the Fourth Amendment. We will address each event separately.

The initial opening of the appellant's package by Federal Express employee Kaufmann was a private act, not a government act. The Fourth Amendment does not apply "to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official." Walter v. United States, 447 U.S. 649, 662, 100 S.Ct. 2395, 2404, 65 L.Ed.2d 410 (1980). Therefore, no Fourth Amendment violation occurred at that point.

Likewise, the "sniff test" by the narcotic detection dog did not come within the protection afforded by the Fourth Amendment.

"This conclusion is dictated by United States v. Place, 462 U.S. 696, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983), in which the Court held that subjecting luggage to 'sniff test' by a trained narcotics detection dog was not a 'search' within the meaning of the Fourth Amendment.

"'A "canine sniff" by a well-trained narcotics detection dog, however, does not require opening the luggage. It does not expose noncontraband items that otherwise would remain hidden from public view, as does, for example, an officer's rummaging through the contents of the luggage. Thus, the manner in which information is obtained through this investigative technique is much less intrusive than a typical search. Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtaineid is limited."'

Jacobsen, 466 U.S. at 123-34, 104 S.Ct. at 1662, 80 L.Ed.2d at 101. (Some citations omitted.)

Therefore, this case turns on the actions of the police after the discovery of the appellant's package by a private party and after the narcotics detection dog "alerted" on the appellant's package. The "sniff test" indicated that the appellant's package might contain drugs. Based upon this information, Ware, an officer of the Huntsville Police Department, opened the package without a search warrant and inspected its contents. He also conducted a field test, which positively indicated the presence of cocaine.

The facts of this case are strikingly similar to those in Jacobsen. In Jacobsen, employees at a Federal Express office in

the Minneapolis-St. Paul airport found a package that had been damaged by a forklift. In accordance with company policy when there might be an insurance claim, they opened the package and examined its contents. The Court described the contents of the package as follows:

> "The container was an ordinary cardboard box wrapped in brown paper. Inside the box five or six pieces of crumpled newspaper covered a tube about 10 inches long; the tube was made of the silver tape used on basement ducts. The supervisor and office manager cut open the tube, and found a series of four zip-lock bags, the outermost enclosing the other three and the innermost containing about six and a half ounces of white powder."

When the Federal Express employees found the white powder they notified the Drug Enforcement Administration (DEA). The DEA agents conducted a field test, which indicated the powder was cocaine. Later,

agents conducted a second field test and obtained a search warrant for the addressee's residence.

In Jacobsen, the Court addressed the validity of government searches that follow searches by private parties, specifically searches by common carriers in the course of their business.

> "When the wrapped parcel involved in this case was delivered to the private freight carrier, it was unquestionably an 'effect' within the meaning of the Fourth Amendment. Letters and other sealed packages are in the general class of effects in which the public at large has a legitimate expectation of privacy; warrantless searches of such effects are presumptively unreasonable. Even when government agents may lawfully seize such a package, to prevent loss or destruction of suspected contraband, the Fourth Amendment requires that they obtain a warrant before examining the contents of such a package. Such a warrantless search could not be characterized as reasonable simply because after the

official invasion of privacy occurred, contraband is discovered. Conversely, in this case the fact that agents of the private carrier independently opened the package and made an examination that might have been impermissible for a government agent cannot render otherwise reasonable conduct unreasonable. The reasonableness of an official invasion of the citizen's privacy must be appraised on the basis of the facts as the existed at the time the invasion occurred.

"The initial invasions of respondent 's package were occasioned by private action. Those invasions revealed that the package contained only one significant item, a suspicious looking tape tube. Cutting the end of the tube and extracting its contents revealed a suspicious looking plastic bag of white powder. Whether those invasions were accidental or deliberate, and whether they were reasonable or unreasonable, they did not violate the Fourth Amendment because of their private character.

" The additional invasions of respondent's privacy by the Government agent must be tested by the degree to which they

> exceeded the scope of the private search. That standard was adopted by a majority in Walter v. United States, supra [447 U.S. 649, 100 S.Ct. 2395, 65 L.Ed.2d 410 (1980)]. " 466 U.S. at 114-15, 104 S.Ct. at 1656-57, 80 L.Ed.2d at 94-5. (Emphasis added.)

We have no choice but to follow the holding of Jacobsen because the facts of the present case are so similar. State courts are bound by the interpretations given to the Fourth Amendment by the United States Supreme Court. Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed. 1081 (1961); Wolf v. Colorado, 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782 (1949). If we ignore Jacobsen we would be ignoring our duty to uphold the Constitution and would be setting the stage for almost certain reversal by a higher court.

In this case, the appellant's package was almost identical to the one in

Jacobsen. Cocaine had been wrapped in a tape tube, which was then wrapped in newspaper and stored in a box. However, in Jacobsen the private search went beyond that in the present case. The United States Supreme Court upheld the search by government agents because it did not exceed the scope of the private search. Here, Kaufmann, the Federal Express operations manager, did not cut open the tape tube as was done in Jacobsen. Rather, he stopped the search when he smelled the insecticide odor. Under Jacobsen, we must judge the actions of the police by the degree by which they exceeded the scope of the private search.

Under Jacobsen, Ware exceeded the scope of Kaufmann's search when he cut open the tube in the appellant's package without a search warrant. Jacobsen

establishes that a legitimate expectation of privacy exists in sealed packages sent by common carrier and that a warrantless government search cannot exceed what was carried out by private parties. Ware should have obtained a search warrant before cutting open the tubular package that contained cocaine. Ware had probable cause to obtain a search warrant based on his observations and on the results of the "sniff test" by the narcotics detection dog. Because Ware had dominion and control over the package, there was little chance of loss or destruction of the package. There were no exigent circumstances that justified opening the package before obtaining a search warrant. Therefore, under Jacobsen, the trial court should have granted the appellant's motion to suppress evidence of the cocaine.

> "When police have reasonable, articulable suspicion that evidence of criminal activity is located in a movable container, they may secure the container to prevent its loss or destruction, but they must get a warrant before conducting a search. In certain circumstances, however, the police may conduct warrantless searches of both open and closed containers. For example, based upon probable cause, the police may search any container located in an automobile, whether the probable cause applies to the container itself or to the automobile as a whole. The police also need no warrant to search a container if its illicit contents are in plain view or may be inferred from its outward appearance, to search an abandoned container, or to search a container to the extent of a previously conducted private search."

Criminal Procedure Project, 82 Geo. L. J. 671-72 (1994). (Emphasis added.)

The state contends that the appellant's package falls within the "plain view" exception because its configuration is similar to that commonly

used to ship drugs by common carrier. However, the state bases this argument on language in Arkansas v. Sanders, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979), which was later quoted in Robbins v. California, 453 U.S. 420, 101 S.Ct. 2841, 69 L.Ed.2d 744 (1981). However, the state's argument is somewhat misplaced. First, Sanders and Robbins addressed searches of containers in the context of automobile searches, which is not an issue in this case. Second, the holdings of Sanders and Robbins were limited somewhat in United States v. Ross, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982), and Sanders was overruled in California v. Acevedo, 500 U.S. 565, 111 S.Ct. 1982, 114 L.Ed.2d 619 (1991).

The appellant further contends that Huntsville police officers Ware and Posey

illegally investigated the package at Federal Express in Madison because they were outside their jurisdiction. This issue was not presented in the trial court and, therefore, was not preserved for our review. Tavlor v. State, 600 So.2d 1080, 1081 (Ala. Cr. App. 1992).

The court erred in denying the appellant's motion to suppress. For the foregoing reasons, the judgment is reversed and the cause remanded to the Marshall County Circuit Court for proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

ALL THE JUDGES CONCUR, EXCEPT LONG, J., WHO RECUSES.

APPENDIX B

RELEASED

SEP 2 2 I995

CLERK

SUPREME COURT OF ALABAMA

SPECIAL TERM, 1995

1941200

Ex parte State of Alabama

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS

(Re: Mark Anthony Seeley)

v.

State)

(Marshall Circuit Court, CC-93-173;

Court of Criminal Appeal:, CR-93-1739)

KENNEDY, JUSTICE.

WRIT DENIED. NO OPINION.

Hornsby, C. J., and Almon, Shores, and Cook, JJ., concur.

Maddox, Houston, and Butts, JJ., dissent.

Ex parte State (Mark Anthony Seeley

MADDOX, JUSTICE (dissenting).

A majority of this Court refuses to review the judgment of the Court of Criminal Appeals; I believe the judgment denying review misapplies the law of search and seizure as it relates to the search of a closed container inside a package that was opened by Federal Express employees to determine the ownership of the package, after the Fed Ex employees were unsuccessful in finding the address shown on the package. The Fed Ex employees were following company policy.

I would issue the writ and reverse the judgment of the Court of Criminal Appeals.

The facts of the case are not in material dispute. They are set out in the Court of Criminal Appeals' opinion:

"The appellant, Mark Anthony Seeley, pleaded guilty to possession of a controlled substance (cocaine), a violation of § 13A-12-212, Code of Alabama 1975. He specifically reserved his right to appeal the trial court's denial of his motio to suppress certain evidence and was sentenced to seven years in the penitentiary. His sentence was split and he was ordered to serve 60 days in jail and to spend 3 years on supervised probation.

"The state's evidence at the appellant's suppression hearing tended to show that on January 30, 1993, the Federal Express courier service office in Madison Alabama, received a package addressed to the appellant bearing a return address in Dallas, Texas. Fred Kaufmann, the Federal Express operations manager in Madison, testified that they were unable to deliver the package because the courier had trouble finding the address and because the customer service agent was unable to contact the appellant by telephone. Apparently the telephone number that had been given as the appellant's was no longer in service.

"Kaufmann testified that if Federal Express cannot resolve a delivery problem through research, then it is a company practice to open the package to see if any other delivery information can be found. Kaufmann testified that he opened the package. He testified that the package was about the size of a shoe box and that it was heavily wrapped in masking tape. Inside the package he found a tubular package wrapped in tape and packed in newspaper. Kaufmann testified that he smelled a strong odor similar to insecticide coming from the package. At that point he became suspicious and decided to call Officer Billy Ware, a narcotics officer with the Huntsville Police Department. He testified that he left the package in the same condition it was in until Ware arrived.

"Ware testified that he arrived at the Federal Express office to inspect the package. Like Kaufmann, he testified that there was a strong odor of 'bug spray.' Ware testified that many substances are used to mask the smell of narcotics in packages--e.g., herbicide, gasoline, diesel fuel, fabric softener, and coffee. He then squeezed the tubular package and felt powdery, granulated substance inside. Ware testified that he told Kaufmenn that in his opinion the package contained narcotics. At that point, Ware called Officer Michael Posey of the Huntsville

Police Department K-9 unit and asked him to bring his narcotics detection dog to the office. Before Posey arrived, Ware placed the tubular package in a metal electrical box on the wall in the southeast section of the warehouse portion of the office.

"Posey testified that when he arrived, Ware instructed him to have the dog search the southeast section of the warehouse. Posey testified that the dog 'alerted' in the area of the electrical box where the package was located. Posey testified that an 'alert' occurs when the dog smells narcotics. He said that the dog's breathing pattern changes but that at that point the dog was not yet pinpointed the location. When the dog finds the strongest source of the odor it will scratch or bite at that location. Posey testified that his dog scratched on the electrical box where the package was located. At that time Posey pulled the dog off the search area and told Ware that there was a strong indication of narcotics in the electrical box where the package was hidden. Ware then retrieved the package from the electrical box.

"Ware testified that he told Kaufmann that he was going to take the package to his office and he then signed a receipt for it. When Ware arrived at his office, he called the district attorney and explained how

he came into possession of the package. After he talked with the district attorney, Ware opened the package and performed a field test on the white powder contained inside. Ware testified that the test gave a positive indication for the presence of cocaine. Subsequent testing by the Alabama Department of Forensic Sciences proved that the powder was cocaine. He said that he then secured the package in his drug evidence locker.

"On Monday, February 1, 1993, someone from Federal Express telephoned to tell Ware that the appellant had telephoned Federal Express and that he wanted his package delivered. Ware began making arrangements with the Marshall County Sheriff's Deportment for a controlled delivery. Ware testified that in preparation for the controlled delivery, he removed most of the cocaine powder from the package. He then mixed about 1.4 ounces of baking soda with two or three grams of the cocaine powder and put that mixture in the package. Also, Ware borrowed a van and a courier's uniform from Federal Express in order to make the delivery.

"Ware telephoned the appellant on Monday and arranged to deliver the package on Tuesday, February 2, 1993, at a place in Marshall County near Guntersville. Ware met with three officers from the Marshall County

officers from the Marshall County Sheriff's Department's drug enforcement unit to execute the controlled delivery. These officers were Sonny Riddle, Paul Evans, and Martin Killion. Martin Killion wore the Federal Express uniform and drove the van to make the delivery, while Ware, Riddle, and Evans waited nearby. Killion met the appellant at the designated location and delivered the package and the appellant signed for it, got in his car, and drove away. After the appellant had driven a few blocks, Ware, Riddle, and Evans stopped his car and arrested him. The package was recovered from the appellant."

Seeley v. State, [CR-93-1739, March 24, 1995)___ So. 2d ___ (Ala. Crim. App. 1995).

Based on the above quoted facts, and applying the principles of law stated in recent opinions of the Supreme Court of the United States, I think it apparent that the Court of Criminal Appeals erred in holding that the State's warrantless search and seizure of the defendant's parcel violated the defendant's rights

under the Fourth and Fourteenth Amendments to the United States Constitution.

The Court of Criminal Appeals, in reversing the defendant's conviction, relies heavily on the United States Supreme Court's interpretation of search and seizure law was set out in United States v. Jacobsen, 466 U.S. 109 (1984). In Jacobsen, the Court held that removal by federal agents, who had been informed by employee of a private freight carrier that they had observed a white powdery substance in the innermost of a series of four plastic bags that had been concealed in a tube inside damaged package, was not an unreasonable search and seizure. In its opinion, the Court of Criminal Appeals stated that "[t]he facts in this case are remarkably similar to those in Jacobsen, but the application of the

principles of that case mandate a different outcome in this case. " ___ So. ___ 2d at. More specifically, my problem deals with the following paragraph the Court of Criminal Appeals quoted from Jacobsen in support of its holding that the trial court erred in denying the defendant's motion to suppress:

> "When the wrapped parcel involved in this case was delivered to the private freight carrier, it was unquestionably an 'effect' within the meaning of the Fourth Amendment. Letters and other sealed packages are in the general class of effects in which the public at large has a legitimate expecation of privacy; warrantless searches of such effects are presumptively unreasonable. [Omitted footnote at this point cited United States v. Chadwick.] Even when government agents may lawfully seize such a package to prevent loss or destruction of suspected contraband the Fourth Amendment requires that they obtain a warrant before examining the contents of such a package. [Omitted footnote cites

> contents of such a package. [Omitted footnote cites Chadwick.] Such a warrantless search could not be characterized as reasonable simply because after the official invasion of privacy occurred contraband is discovered. Conversely, in this case the fact that agents of the private carrier independently opened the package and made an examination that might have been impermissible for a government agent cannot render otherwise reasonable conduct unreasonable. The reasonableness of an official invasion of the citizen's privacy must be appraised on the basis of the facts as the existed at the time the invasion occurred."

466 U.S. at 114-15 (as quoted at ___ So. 2d___) (the Court of Criminal Appeals added the emphasis in that quotation, but did not indicate that it was omitting footnotes citing United States v. Chadwick, 433 U.S. 1 (1977), abrogated by California v. Acevedo, 500 U.S. 565 (1991)).

It is apparent to me that the Court of Criminal Appeals relied heavily on the Jacobson opinion to reach its result. I would issue the writ because the Court of Criminal Appeals seems to be applying principles of law that were established by Chadwick, which was overruled by California v. Acevedo, 500 U.S. 565 (1991).

The State, in its brief, correctly states that the United States Supreme Court, in California v. Acevedo, further clarified the law as it applies to searches of containers, especially those found in an automobiles. In Acevedo, the Supreme Court stated:

> "The interpretation of the Carroll [Carroll v. United States, 267 U. S. 132 (1925)] doctrine set forth in Ross [United States v. Ross, 456 U.S. 798 (1982)] now applies to all searches of containers found in

an automobile. In other words, the police may search without a warrant if their search is supported by probable cause. The Court in Ross put it this way:

"'The scope of a warrantless search of an automobile -... is not defined by the nature of the container in which the contraband is secreted. Rather, it is defined by the object of the search and the places in which there is probable cause to believe that it may be found.' 456 U.S., at 824.

"It went on to note: 'Probable cause to believe that a container placed in the trunk of a taxi contains contraband or evidence does not justify the search of the entire cab.' Ibid. We reaffirm that principle. In the case before us, the police had probable cause to believe that the paper bag in the automobile's trunk continued marijuana. That probable cause now allows a warrantless search of the paper bag. The facts in the record reveal that the police did not have probable cause to believe that contraband was hidden in any other part of the automobile and search of the entire vehicle would have been without probable

cause and unreasonable under the Fourth Amendment."

500 U.S. at 579-80.

I recognize that this case and the cases cited in the State's brief for example Arkansas v. Sanders, 442 U. S. 753 (1979), which was later quoted in Robbins v. California, 453 U.S. 420 (1981), overruled by Unit d States v. Ross, 456 U.S. 798 (1982)) all involve the search of a package located in an automobile, but I do not believe that the automobile exception to the warrant requirement, while significant, is determinative of the right to seize property that police have probable cause to believe is contraband. In my opinion, the question whether the search and seizure are reasonable must depend upon whether the defendant's expectations of

privacy were violated. Because I believe that from a "totality of the circumstances" the police had probable cause to believe the sealed container contained contraband, they had a right to seize it without a warrant. Stated differently, it seems to me that the warrantless search in this case can be justified on the grounds that, at the time the police seized the container, they had probable cause to believe that it contained contraband, and that the owner had no reasonable expectation of privacy, in view of the totality of the circumstances surrounding the seizure. In short, I believe that at the time the contraband was seized the officers had probable cause to believe that the container held contraband that was in "plain view," and that the police, having probable cause to believe that the

container held contraband, had a right to seize it and search it, without first obtaining a warrant. Cf. Chambers v. Maroney, 399 U.S. 42 (1975). In Chambers, the United States Supreme Court said that if police officers had had probable cause to make a warrantless search of an automobile on the highway, then they could make a warrantless search of the vehicle later when it was in police custody, even though the police could have obtained a warrant. The essence of the holding in Chambers, in my opinion, is that the Supreme Court of the United States, in enforcing the Fourth Amendment's prohibition against unreasonable searches and seizures, will insist upon probable cause as a minimum requirement for a reasonable search permitted by the Constitution, but if probable cause

exists, and an exception to the warrant requirement also exists, such as the "plain view" exception, as in this case, then the warrantless search and seizure are not unreasonable.

Under the "plain view" doctrine, if the police are lawfully in a position from which they can view an object, if the incriminating character of the object is immediately apparent, and if the officers have a lawful right to access to the object, then they may seize it without a warrant. In the present case, the police were called by Federal Express employees to inspect the package. They did inspect it. The police were lawfully in a position from which they could view the object. The object had been wrapped by a method known by police to be a common method used to conceal drugs; the object had the smell of

insecticide, which was also known by police to be commonly used to attempt to conceal the odor of drugs; the object felt like it held a granular substance (cocaine); and, finally, a trained narcotics detection dog indicated that the object contained drugs. All of the attendant factors, combined together, provided the police with sufficient probable cause to believe that the package continued contraband. It is well settled that one has no legitimate expectation of privacy in contraband, and the Fourth Amendment protects persons only from "unreasonable searches and seizure."

As I understand the "exclusionary rule," it was to deter police misconduct by depriving the prosecuting authority of the right to use evidence that was illegally seized. In my opinion, the

conduct of the police in this case, based on all the attendant circumstances did not violate this defendant's privacy rights. I must respectfully dissent.

APPENDIX C

RELEVANT ALABAMA STATUTES

CODE OF ALABAMA, 1975

TITLE 13A

§13A-5-6. SENTENCES OF IMPRISONMENT FOR FELONIES.

(a) Sentences for felonies shall be for a definite term of imprisonment, which imprisonment includes hard labor, within the following limitations:

(1) For a Class A felony, for life or not more than 99 years or less than 10 years.

(2) For a Class B felony, not more than 20 years or less than 2 years.

(3) For a Class C felony, not more than 10 years or less than 1 year and 1 day.

(4) For a Class A felony in which a firearm or deadly weapon was used or attempted to be used in the commission of the felony, not less than 20 years.

(5) For a Class B or C felony in which a firearm or deadly weapon was used or attempted to be used in the commission of the felony, not less than 10 years.

(b) The actual time of release within the limitations established by subsection (a) of this section shall be determined under procedures established elsewhere by law.

§13A-12-212. UNLAWFUL POSSESSION OR RECEIPT OF CONTROLLED SUBSTANCES.

(a) A person commits the crime of unlawful possession of controlled substance if:

(1) Except as otherwise authorized, he possesses a controlled substance enumerated in schedules I through V.

(2) He obtains by fraud, deceit, misrepresentation or subterfuge or by the alteration of a prescription or written order or by the concealment of a material fact or by the use of a false name or giving a false address, a controlled substance enumerated in schedules I through V.

(b) Unlawful possession of a controlled substance is a Class C felony.

(3)

Supreme Court, U.S.
FILED
APR 15 1996
CLERK

No. 95-1040

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

STATE OF ALABAMA,

Petitioner,

v.

MARK ANTHONY SEELEY,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Alabama

BRIEF IN OPPOSITION

T.J. CARNES*
Attorney for Respondent

104 N. Emmett Street
Albertville, AL 35950
(205) 878-2461

MICHAEL D. MASTIN
Attorney for Respondent

P.O. Box 944
Albertville, AL 35950
(205) 891-2149

**Counsel of Record*

PRESS OF BYRON S. ADAMS ✦ WASHINGTON, D.C. ✦ 1-800-347-8208

7pp

TABLE OF CONTENTS

	PAGE NO. :
STATEMENT OF THE CASE	1
STATEMENT OF THE FACTS	1
ARGUMENT	2

TABLE OF CASES

PAGE NO. :

UNITED STATES v. JACOBSEN

466 U. S. 109, 80 L.Ed.

2d 85, 104 S. Ct. 1652 (1094) 2, 3, 4

STATEMENT OF THE CASE

The Respondent, Mark Anthony Seeley, who will hereinafter be referred to as "Seeley," accepts the Petitioner's, hereinafter referred to as "State," statement of the case with the exclusion on the self-serving descriptions of the holding by the Alabama Court of Criminal Appeals.

STATEMENT OF THE FACTS

Seeley accepts the State's statement of the facts.

ARGUMENT ONE

The petition for a writ of certiorari should not be granted as the State is clearly seeking a review of the factual findings and/or the misapplication of a properly stated rule of law.

This is a search and seizure issue. The facts are undisputed. The Alabama Court of Criminal Appeals applied the facts to a properly stated rule of law. The rule of law is contained in United States v. Jacobsen, (466 U. S. 109, 80 L. Ed. 2d 85, 104 S. Ct. 1652 [1989]). The issue is what action can the government take after seizing an "effect" which was initially seized by private action. In Seeley, the effect was a Federal Express package that had been detained by an employee of Federal Express. The rule of law is that additional invasions of the respondent's privacy by the government agent must be tested by the degree to which they exceeded the scope of the private search. After review, the Alabama Court of Criminal Appeals held that Seeley had a

legitimate expectation of privacy in his sealed package and that the State should have obtained a search warrant. The Court further held that there were no exigent circumstances that justified opening the package before obtaining a search warrant.

ARGUMENT TWO

The petition for a writ of certiorari should not be granted in that the decision of the Alabama Court of Criminal Appeals and the Supreme Court of Alabama does not conflict with a United States Court of Appeals nor does this issue presented need to be settled by the Supreme Court of the United States.

The decision by the Alabama Court of Criminal Appeals in Seeley is entirely consistent with Jacobsen. The State alleges that the Court of Criminal Appeals misread the facts in Jacobsen to be that the private parties, rather than the government agents, opened the plastic bags of drugs. It is

unclear as to how the State reached this opinion. It is clear by a careful reading of Jacobsen that the supervisor cut open the tube and observed the white powder. The government "re-examined" the contents. In Seeley, the State made the initial intrusion into the actual package. The Alabama Court of Criminal Appeals applied Jacobsen to the facts of Seeley.

The remaining litany of cases the State cited in its petition do not apply to this fact situation. We submit that the rule of law was properly stated in Jacobsen and correctly applied by the Court of Criminal Appeals to the Seeley facts.. We further submit that the petition for certiorari should be denied.